

## **CROSS BORDER DE-MERGERS: NCLT'S ORDER IN THE SUN PHARMACEUTICAL CASE**

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### **ABSTRACT**

The National Company Law Tribunal in a petition filed by Sun Pharmaceutical Industries Limited has further confounded the concept of cross border demergers in India under the Companies Act, 2013 and has reawakened interest in the debate of legislative intent vs strict interpretation of statutes by the judiciary and quasi judiciary in India. With its order, the National Company Law Tribunal has adopted a strict interpretation of the provisions of Section 234 of the Companies Act, 2013, upholding that cross-border demergers are prohibited under the said provision. However, this has contributed more confusion with respect to the legal framework governing cross border inbound and outbound demergers in India, especially since this order contradicts an earlier judgment passed by the same bench of the National Company Law Tribunal permitting inbound cross border demerger. This case comment analyses the factual matrix and the order passed by the National Company Law Tribunal in the said matter and concludes with a comment on the approach adopted by the tribunal therein.

## INTRODUCTION

The National Company Law Tribunal (“NCLT”) in a petition<sup>i</sup> filed by Sun Pharmaceutical Industries Limited (the “**Sun Pharmaceutical Case**”) has further confounded the concept of cross border demergers in India under the Companies Act, 2013 and has reawakened interest in the debate of legislative intent vs strict interpretation of statutes by the judiciary and quasi judiciary in India.

This case comment analyses the factual matrix and the order passed by the NCLT in the Sun Pharmaceuticals Case and concludes with a comment on the approach adopted by the NCLT therein.

## THE FACTUAL MATRIX

A petition was filed by Sun Pharmaceutical Industries Limited (“**Sun Pharmaceutical**”), a public company having its shares listed at the Bombay Stock Exchange Limited and National Stock Exchange of India Limited, before the NCLT (Ahmedabad), for sanction of a scheme of arrangement involving a demerger and transfer of two specified investment undertakings of Sun Pharmaceuticals to two overseas resulting companies namely, Sun Pharma (Netherlands) B.V. and Sun Pharmaceutical Holdings USA Inc. (collectively, the “**Resulting Companies**”). The Resulting Companies were directly or indirectly wholly owned subsidiaries of Sun Pharmaceutical and were respectively incorporated in Netherlands and United States of America, and the scheme was proposed to consolidate the holding structure of said subsidiaries of Sun Pharmaceutical.

For sanction of the scheme, prior approvals from the relevant stock exchanges, the Reserve Bank of India, the unsecured creditors and the shareholders of Sun Pharmaceuticals were procured by Sun Pharmaceutical. Further, no representation was received from the relevant statutory authorities pertaining to the proposed scheme, except from the Central Government through its regional director, North-Western Region. One of the key observations made by the regional director with respect to the proposed scheme was that Section 234 of the Companies

Act, 2013 does not refer to de-mergers but only is in reference to cross border mergers and amalgamations.

## **THE NCLT'S ORDER**

With respect to the regional director's observations, the NCLT considered the applicability of Sections 230, 232 and 234 of the Companies Act, 2013. The NCLT held that Sections 232 and 234 of the Companies Act, 2013, which only relate to Indian companies, are applicable to compromise and/or arrangements between companies, which is inclusive of demergers. However, as per Section 234 of the Companies Act, 2013, which deals with cross border mergers of Indian companies, only the terms, "mergers" and "amalgamations" have been included. Since Section 234 of the Companies Act, 2013 does not include the terms, "compromise", "arrangement", or "demerger", the NCLT held that it can be construed that Section 234 of the Companies Act, 2013 does not provide for a cross border compromise, arrangement or demerger of Indian companies with foreign companies and vice versa. As such, the NCLT held that Section 234 of the Companies Act, 2013 does not provide for, and rather restricts, a demerger of an Indian company with a foreign company.

The NCLT further noted that Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, which deals with cross border mergers, is silent on "demergers" and mentions only "mergers" and "amalgamations".

Additionally, the NCLT observed that the Foreign Exchange Management (Cross Border Merger) Regulations 2018, are applicable only to mergers and amalgamations of Indian companies with foreign companies. While the regulations, in their draft form, had included demergers within the definition of "cross border mergers", the regulations, as notified by the Reserve Bank of India, had specifically deleted and excluded demergers from the definition of "cross border mergers". By this intentional exclusion of demergers, the NCLT held that it was crystal clear that demerger of Indian companies with foreign companies was not permitted.

The NCLT held a statute has to be expounded according to its obvious meaning and that is a cardinal rule of interpretation that statutory expressions should be interpreted in their ordinary and primary sense. As the legislation does not explicitly permit out-bound demergers, the NCLT held that it does not fall to the tribunal to substitute its opinion when the law itself was clear and beyond all ambiguity. Thereby, the NCLT disallowed the petition of Sun Pharmaceutical.

## COMMENT

With its order in Sun Pharmaceuticals, the NCLT has adopted a strict interpretation of the provisions of Section 234 of the Companies Act, 2013 in its order upholding that cross border demergers are prohibited under the said provision. However, this has contributed more confusion with respect to the legal framework governing cross border inbound and outbound demergers in India as the NCLT's order contradicts an earlier judgment of the same bench, NCLT (Ahmedabad) in a petition filed by Sun Pharmaceuticals for sanction of a scheme involving an inbound demerger<sup>ii</sup>.

In its earlier judgment, the NCLT had taken note of the observations by the regional director, Central Government – North Western region, that Section 234 of the Companies Act, 2013 does not include demergers within its scope. However, the NCLT took note of the response filed by Sun Pharmaceuticals that Sections 232 to 234 of the Companies Act, 2013 have the same nomenclature as mergers and amalgamations. Further, that Section 232(b) of the Companies Act, 2013 permits demergers where a part of an undertaking of the transferor company can be transferred and that all applicable provisions of the Companies Act, 2013 for mergers and amalgamations can be applied to a scheme for demergers as well. There was no further discussion by the NCLT in its earlier judgment, regarding the scope and interpretation of Section 234 of the Companies Act, 2013 and the petition for approval of scheme involving an inbound cross border demerger was accordingly approved by the NCLT.

In comparison with its aforementioned judgment, the recent order by NCLT confounds the law relating to cross border demergers in India, whereby the NCLT examines and strictly interprets

the provisions of Section 234 of the Companies Act, and thereby, proceeds to prohibit outbound cross border demerger.

This strict interpretation of law adopted by the NCLT, may hamper cross border demergers in India. It further may be against the legislative intent behind the provisions of the Companies Act, 2013, as embodied in the Report on Company Law submitted by Dr. Jamshed J. Irani in 2005<sup>iii</sup>, which states that mergers and amalgamations include demergers within its scope and that a forward looking law needs to recognize cross border mergers/ demergers. Therefore, an appropriate clarity, either by way of judicial interpretation or legislative reform, on the scope of cross border demergers under the Companies Act, 2013, continues to remain the need of the hour, especially pursuant to the NCLT's order in the Sun Pharmaceutical Case.

## REFERENCES

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<sup>i</sup> CA(CAA) NO. 38/NCLT/ AHM/2019

<sup>ii</sup> CA (CAA) No.18/NCLT/AHM/2018

<sup>iii</sup> Dr. Jamshed J. Irani, REPORT ON COMPANY LAW, available at <http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf>